there. For the record, I may mention that Peter Wahid Andu died in an air crash in June 1976 and a judgment in default had been obtained by the bank against his estate in the High Court in Borneo pursuant to the guarantee given by him on 7 March 1974. Only part of the judgment had been satisfied from his estate. Having said the foregoing, I must hasten to clarify that this matter in no way affects the points discussed above relating to the mental incapacity of the third plaintiff and the exercise of undue influence by the second plaintiff over the third plaintiff.

In the result, I would grant a declaration that the mortgage deed executed by the third plaintiff is voidable at the option of his committee and would set it aside (in so far as it affects the third plaintiff) and grant such other consequential reliefs as may be necessary. The third defendant shall bear the costs of the plaintiffs.

Order accordingly.

Solicitors: *V Ramakrishnan & Co; Ng Kian Fong & Co; Mallal & Namazie.*

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Siew Kam Weng v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) - CRIMINAL APPEAL NO 14 OF 1988
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND AJAIB SINGH SCJJ
16 SEPTEMBER 1989

Criminal Procedure - Trial by jury - Charge of murder - Jury finding accused guilty of lesser offence of culpable homicide not amounting to murder by a majority of five to two - Trial judge unable to concur with majority verdict - Retrial ordered - Appeal - Jury rightly discharged - Criminal Procedure Code (FMS Cap 6), ss 204, 224, 225, 228, 229, 230 & 231

In this case, the appellant had been tried on a charge of murder of an 11-year old girl, an offence under s 302 of the Penal Code (FMS Cap 45). The appellant was tried before a jury of seven persons who found him guilty of the lesser offence of culpable homicide not amounting to murder by a majority of five to two. The trial judge was unable to concur with the majority verdict and ordered the appellant to be retried before another jury. The appellant appealed. In his summing up, the trial judge had indicated that substantially the prosecution had conducted its case on the basis of murder or nothing. He did direct the jury on the four possible verdicts that they could return, including a verdict of guilty of culpable homicide not amounting to murder. The main ground of appeal was that having directed the jury on the four possible verdicts, the learned trial judge had no alternative but to accept and concur with the majority verdict.

Held, dismissing the accused's appeal:

(1) The English principle that an appellate court has no jurisdiction to review the trial judge's exercise of discretion to order the accused to be tried before another jury is founded on even stronger ground in this country when such order is made as a result of the exercise of option by the trial judge not to concur with the majority verdict under s 231(b) of the Criminal Procedure Code (FMS Cap 6).

(2) In the light of the statutory provision clearly expressed in s 231(b) of the Criminal Procedure Code (FMS Cap 6), when the trial judge in a jury trial did not concur with a majority verdict of guilty for whatever offence returned by the jury, the judge had no alternative but to discharge the jury and order the accused to be tried before another jury.

(3) The duty of the trial judge under s 223 of the Criminal Procedure Code (FMS Cap 6), in summing up the evidence and laying down the law by which the jury are to be guided, has nothing to do with his duty and option under s 231 of the Code if the guilty verdict of the jury is not unanimous.

Cases referred to

1 *Windsor* v *The Queen* (1866) 1 LRQB 289 (follld)
2 *R* v *Newton* 174 ER 896 (follld)
3 *R* v *Lewis* (1909) 2 Cr App R 180 (follld)
4 *R* v *Home Office, ex p Graham* [1983] 1 WLR 1281 (follld)
5 *R* v *Beadell* (1933) 24 Cr App R 39 (follld)
6 *R* v *Randall* (1960) Cr LR 435 (follld)
7 *R* v *Gorman* [1987] 1 WLR 545 (follld)
8 *Ramlan bin Salleh* v *PP* [1987] 2 MLJ 709 (follld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 204, 224, 225, 228, 229, 230, 231

Appeal from: Criminal Trial No 55-11-87 (High Court, Penang).

Ajmeer Singh Sandhu for the appellant.
Stanley Isaacs (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): The appellant was tried in the Penang High Court on 9 November 1987 for the murder of an 11-year old girl, an offence under s 302 of the Penal Code (FMS Cap 45). It was the case for the prosecution that the girl had been sexually assaulted before she was strangled to death and her body dumped in a manhole. The appellant was tried before a jury of seven persons who found him guilty of a lesser offence of culpable homicide not amounting to murder by a majority of five to two. The trial judge was unable to concur with the majority verdict and ordered the appellant to be retried before another jury pursuant to s 231(b) of the Criminal Procedure Code (FMS Cap 6). The appellant filed a notice of appeal against the said order, and we dismissed the appeal on 4 August 1989.

At the commencement of the hearing, we had referred both counsel to the unusual nature of this appeal in that, notwithstanding the absence of a conviction or sentence, an appeal had been filed 'against the said decision of retrial and rejection of the verdict of the jury'. It caused us to recall the statement of Lord Blackburn J in *Windsor* v *The Queen*[1] at p 301 quoting Lord Denman CJ in *R* v *Newton*:[2]

> The discharge of the jury is neither an acquittal nor a conviction - there is no judgment...

It was quite obvious even if learned counsel for the appellant had not informed us that the appellant was quite happy with the verdict returned by the majority of the jury and was aggrieved by the order of retrial made by the learned judge. On the other hand, the learned DPP made a revelation from the Bar that the Public Prosecutor had in fact applied by motion to have this appeal struck out but the application had been dismissed summarily by this court some time last year before another corum. In the absence of an oral or written judgment, we hoped we would be forgiven for giving ourselves the liberty to decide on whatever issues we deemed necessary in this appeal without being inhibited by the dismissal of the Public Prosecutor's motion.

In the course of his 46-page summing up to the jury, the learned judge had said at p 281:

> Substantially speaking, the prosecution has conducted its case on the basis of murder or nothing.

Further down the same page, in dealing with the defence of alibi, he again said:

> Therefore, the question for your determination would appear to be a straightforward one of guilty of murder or not at all.

But, at p 282, he went on to say:

> The law is clear that if the circumstances open up the possibility of a verdict of culpable homicide not amounting to murder or causing death by a rash act, then it is your duty to consider bringing in such lesser verdicts even though you may reject the defence of alibi raised by the accused in his unsworn statement from the dock.

When dealing with the accused's confession at p 307, the learned judge reminded the jury:

> Accordingly, you are perfectly properly entitled to find the accused guilty of any of the three offences I have earlier mentioned, namely, murder, culpable homicide not amounting to murder or causing death by a rash act on the basis of the confession alone, so long as you believe it to be true.

Then, at p 315, he continued:

> Well gentlemen, I have reviewed the evidence for the prosecution. Now, if after the conclusion of the evidence for the prosecution you consider the case to be one in which you cannot safely convict of murder, culpable homicide not amounting to murder, or causing death by a rash act, then you may return a verdict of not guilty.

Finally, at p 321, after reviewing the defence, the learned judge tabulated the four possible verdicts opened to the jury for their consideration, viz:

(a) a verdict of not guilty - which means the accused will walk out of the dock a free man;
(b) not guilty of murder but guilty of culpable homicide not amounting to murder in contravention of s 304 of the Penal Code (FMS Cap 45);
(c) not guilty of murder but guilty of causing death by a rash act in contravention of s 304A of the Penal Code (FMS Cap 45);
(d) guilty of murder.

The main ground of appeal in the petition was that having directed the jury on the four possible verdicts, the learned trial judge had no alternative but to accept and concur with the majority verdict.

We would now refer to the relevant provisions of the Criminal Procedure Code (FMS Cap 6) (hereinafter referred to as 'the CPC'):

> 204 (i) The jury shall consists of seven persons.
> (ii) The verdict returned shall be unanimous or by a majority of not less than five to two.
>
> 228 (i) If the jury are not unanimous, the Judge may require them to retire for further consideration.
> (ii) After such period as the Judge considers reasonable, the jury may deliver their verdict although they are not unanimous.
>
> 229 If the verdict is not guilty either unanimously or by a majority the judge shall record judgment of acquittal.
>
> 230 If the verdict is guilty unanimously judgment shall be entered accordingly and the judge shall proceed to pass

sentence on the convicted person according to law either then or at a later time during the same trial.

231 If the verdict is guilty by a majority -

(a) if the Court concurs in such verdict judgment shall be entered accordingly and the judge shall proceed to pass sentence as prescribed in section 230;
(b) if the Court does not concur in such verdict the accused person shall be tried again before another jury.

The crucial issue in this appeal was whether once a judge in a criminal trial had decided to discharge a jury and ordered a retrial before another jury, there was any way in which that decision could be challenged. This particular issue had long been settled in England. In *R* v *Lewis*,[3] Channell J said at p 181:

> The established law to the effect that the discharging of the jury is in the discretion of the judge, and that his exercise of the discretion is not subject to review, is not affected by the Criminal Appeal Act 1907, and therefore we have no jurisdiction to deal with it.

The above statement of Channell J was quoted with approval by Robert Goff LJ in *R* v *Home Office, ex p Graham*,[4] where his Lordship held at p 1287:

> It has long been the law that an appellate court ... had no power to review the exercise of discretion of a judge at a criminal trial to discharge the jury and order a retrial.

The principle that the Court of Criminal Appeal has no jurisdiction to interfere with a trial judge's exercise of its discretion in the discharge of a jury was restated in *R* v *Beadell*[5] and in *R* v *Randall*.[6]

More recently in *R* v *Gorman*,[7] it was held that the decision of a trial judge to discharge the deadlocked jury who had voted nine to three in favour of an acquittal was not open to review by an appellate court.

In our opinion, the English principle that an appellate court has no jurisdiction to review the trial judge's exercise of discretion to order the accused to be tried again before another jury is founded on even stronger ground in this country when such order is made as a result of the exercise of option by the trial judge not to concur with the majority verdict of guilty under s 231(b) of the CPC. Here, unlike in England, the making of the retrial order is based on statutory requirement and not merely on the exercise of judicial discretion.

In the light of the statutory provision clearly expressed in s 231(b), we therefore ruled that in a jury trial under the CPC, when the trial judge did not concur with a majority verdict of guilty for whatever offence returned by the jury, the judge had no alternative but to discharge the jury and order the accused to be retried before another jury.

As regards the other part of the appeal against the refusal of the learned judge to concur with the majority verdict, it should be borne in mind that unlike in some other jurisdictions where the jury must be unanimous, our s 228(ii) read with s 204 of the CPC permits the jury to 'deliver their verdicts although they are not unanimous' provided the verdict is by majority of six to one, or five to two. Anything less than five to two is not, therefore, a verdict in law. Thus, whenever the final verdict of the jury is one not recognized by law, there is a deadlock, and in those circumstances the jury may be discharged and a retrial ordered in accordance with ss 234 and 235 of the CPC.

Where the verdict returned by the jury is by a majority, there is a vital distinction between 'guilty' and 'not guilty' verdicts. If the verdict is 'not guilty' by a majority of six to one or five to two, the verdict is recognized by law, and by virtue of s 229 of the CPC, it is clear that the trial judge must record an 'acquittal' except perhaps where the verdict is clearly and utterly perversed. Thus for the validity of a 'not guilty' verdict, it does not matter whether the jury decides unanimously or by majority so long as the majority is not less than five to two.

On the other hand, where the verdict is 'guilty' of whatever offence, the law makes a vital distinction between a unanimous and a majority verdict. If the guilty verdict is unanimous, the trial judge is obliged under s 230 to accept the plea and proceed to pass sentence. But if the guilty verdict is by a majority of not less than five to two, the law requires the trial judge under s 231 either to give or withhold his concurrence to such a verdict. In short, such a majority verdict even though by six to one or five to two is not a verdict in law unless and until the trial judge concurs with it. If he does not concur, s 231(b) comes into operation and the accused must be retried before another jury, for the simple reason that there is a deadlock between the majority of the jury and the judge, and as such there is no verdict in law.

The concurrence required by s 231 of the CPC is a unique provision because it purports to encroach into the province of ss 224(1) and 225 which lay down the rule that the judge determines all questions of law whilst the jury determines all questions of fact. Under s 231, the trial judge can be said to be performing the duty of a judge of facts taking over, as it were, the function of an additional juror so that when he votes with the majority decision, the verdict of the jury, though not unanimous, is recognized as a verdict in law; but if he votes against it, the verdict becomes abortive. Accordingly, the refusal to give concurrence cannot, in our opinion, be subject to review in the same way in that how a juror votes is not subject to appeal. As stated earlier, when a trial judge does not concur with a majority guilty verdict, the deadlock remains, and in the absence of an effective verdict, such a deadlocked jury must be discharged in accordance with the principle laid down in *R* v *Gorman*[7] and under the

provision of s 231(b), the accused is required by law to be retried before another jury.

The argument of the appellant that the learned trial judge had no alternative but to accept and concur with the majority verdict must accordingly fail. When the jury found the appellant guilty of the lesser offence by majority of five to two, there was at that juncture no verdict in law which the learned judge must accept. The fact that in his summing up to the jury, the trial judge had referred to their duty to consider a verdict of guilty of lesser offences other than murder, did not deprive him of the statutory option. In a murder trial, it is essential for the trial judge to direct the jury on the possibility of returning a verdict of guilty of a lesser offence where the evidence of the prosecution or defence so warrants - see *Ramlan bin Salleh* v *PP*.[8] The fact that he had properly directed the jury on offences lesser than murder as warranted by evidence adduced by the defence, cannot be used in argument as a basis for saying that he had exercised his option wrongly under s 231.

The duty of the trial judge under s 223 of the CPC, in summing up the evidence and laying down the law by which the jury are to be guided, has nothing to do with his duty and option under s 231 if the guilty verdict of the jury is not unanimous.

The appeal was accordingly dismissed, and since the alleged offence was committed some years ago, we also ordered that an early date be fixed for the retrial of the appellant.

Appeal dismissed.

Solicitors: *Ajmeer Singh Sandhu & Co.*

Reported by *Prof Ahmad Ibrahim*

Re Thow Seng Yeap; Thow Chow Goon & Anor v Khor Kar Chooi v Anor

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEAL NO 258 OF 1988
MOHAMED AZMI, HARUN HASHIM AND AJAIB SINGH SCJJ
18 OCTOBER 1989

Family Law - Adoption of infant - Refusal of natural parents to give consent - Whether unreasonable - Adoption Act 1952, s 5(1)

In this case the appellants, the natural parents of an infant boy, had given the infant to the respondents for the purpose of adoption according to Chinese custom. The natural parents continued to see the infant from time to time when he was in the custody of the respondents. After two years, the natural parents changed their minds and asked for the return of the infant. The foster parents refused. The foster parents then applied to the High Court for an adoption order. The natural parents opposed the application and withheld consent. The learned judge allowed the application of the respondents, the foster parents. He relied on the de facto adoption of the infant and the fact that the infant had lived for nearly four and a half years with the foster parents. The appellants appealed.

Held, allowing the appeal:
In all the circumstances of this case, the natural parents' withholding of consent was not unreasonable. From the facts of the case, there were no grounds why the foster parents should be preferred to the natural parents from the point of view of the welfare of the infant. It would defeat the object of the legislature that all adoptions should be in accordance with the Act if the courts were to recognize de facto adoptions as a ground for dispensing with parental consent. The court was of the view that, in this case, the change of surroundings would not be disruptive as, after all, the infant is being taken back by his natural parents and is to be brought up together with his twin sister.

Cases referred to
1 *Re PR (An Infant)* (1971) 115 SJ 586 (refd)
2 *O'Connor* v *A and B* [1971] 1 WLR 1227 (distd)

Legislation referred to
Adoption Act 1952 s 5(1)

Teja Singh Penesar for the appellants.
Tan Beng Hong (*Lee Boon Ten* with him) for the respondents.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): On 20 July 1983 twins were born to a Chinese couple. The father (born in 1954) was a goldsmith and also worked as a construction labourer. The mother (born in 1957) was a housewife. The couple's first child is a girl who was born on 9 April 1982. One of the twins is a boy ('the infant') and the other a girl. The infant was born with two teeth. According to Chinese superstition, such a child would be difficult to bring up and so, soon after the birth, the infant was given in the care of the mother of a friend of the father.

As a construction labourer, the father worked for a building contractor (born in 1931) who lived with his wife